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Supreme Court, U.S.
FILED

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In The

Supreme Court of the United States

LARRY HOPE,

Petitioner,

v.

MARK PELZER, GENE MCCLARAN, and JIM GATES a/k/a KEITH GATES,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

LARRY HOPE, Plaintiff, vs. MARK PELZER; GENE McCLARAN; GREG JACKSON; GARY McGEE; JOSEPH STEPHENSON; JIM GATES, also known as KEITH GATES; JAMES KENT; and TED LOGGINS, Defendants.	)	CV 96-BU-2968-S

MEMORANDUM OPINION

(Filed March 24, 2000)

The magistrate judge assigned this matter filed a report and recommendation on March 10, 2000, recommending (1) that the plaintiff's claims for the use of excessive force against concerning a June 7, 1995, altercation be dismissed and that the plaintiff's claims against defendants Greg Jackson, Gary McGee, Joseph Stephenson, James Kent, and Ted Loggins be dismissed premised on the request of the plaintiff and (2) the motions for summary judgment of the remaining defendants be granted on the basis of qualified immunity and that this cause be dismissed with prejudice. (Doc. 45). The plaintiff filed objections to the report and recommendation on March 20, 2000. (Doc. 46).

The plaintiff argues that the magistrate judge's finding that the defendants in this case are entitled to qualified immunity is inconsistent with recent holdings in cases decided in the United States District Court for the Middle District of Alabama. "In this circuit, the law can be 'clearly established' for qualified immunity purposes only by decisions of the U.S. Supreme Court, Eleventh Circuit Court of Appeals, or the highest court of the state where the case arose." *Jenkins v. Talladega City Bd. of Educ.*, 115 F.3d 821, 626-27 n.4 (11th Cir. 1997), quoted in *Florex v. Satz*, 137 F.3d 1275, 1278 (11th Cir. 1998). Furthermore, this case is clearly distinguishable from the case of *Fountain v. Talley*, Case No. 94-C-676-N (M.D. Ala. 2/25/00), which is cited by the plaintiff and attached to his objections. In the case presently before the court, the plaintiff, unlike Fountain, did not allege that he suffered any physical condition which was exacerbated by being placed on the bar, he was provided water on one or two occasions, and he was not denied restroom breaks. To the extent that the plaintiff alleges that guards taunted him about being on the restraining bar and by providing water to the security dogs and then spilling it out of the container, that conduct is not attributed to any defendant presently before this court.

Government officials exercising a discretionary function are entitled to qualified immunity from damages unless their acts or decisions contravene clearly established constitutional or statutory rights of which a reasonable official should have knowledge. *See Mitchell v. Forsyth*, 472 U.S. 511, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985); *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S. Ct. 2751, 73 L. Ed. 2d 396 (1982). The "contours of the rights must

be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 636, 641, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987). The Court specifically finds at the time of the conduct alleged in this case, the law on the use of the restraining bar was not so clearly established as to defeat the defendants' assertion that they are entitled to qualified immunity on the plaintiff's claims that he was subjected to cruel and unusual punishment in violation of the Eighth Amendment when he was placed on the hitching post, and that he was denied due process in violation of the Fourteenth Amendment prior to being placed on the bar.

Having carefully reviewed and considered *de novo* all the materials in the court file, including the report and recommendation and the objections filed by the plaintiff, the Court is of the opinion that the magistrate judge's report is due to be and is hereby ADOPTED and his recommendation is ACCEPTED. The Court EXPRESSLY FINDS that there are no genuine issues of material fact and that the defendants are entitled to judgment as a matter of law. Accordingly, defendants' motions for summary judgment are due to be GRANTED and this action is due to be DISMISSED WITH PREJUDICE. A Final Judgement will be entered.

DONE, this the 24th day of March, 2000.

/s/ H. Dean Buttram, Jr.
H. DEAN BUTTRAM, JR.
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

LARRY HOPE, Plaintiff,	)	CV 96-BU-2968-S
vs.	)	
MARK PELZER; GENE McCLARAN; GREG JACKSON; GARY McGEE; JOSEPH STEPHENSON; JIM GATES, also known as KEITH GATES; JAMES KENT; and TED LOGGINS, Defendants.	)	

FINAL JUDGMENT

(Filed March 24, 2000)

In accordance with the Memorandum Opinion entered contemporaneously herewith and with Rule 58, *Fed. R. Civ. P.*, it is hereby **ORDERED, ADJUDGED,** and **DECREED**

(1) that the plaintiff's claims for the use of excessive force against concerning the June 7, 1995, altercation be dismissed as to all the defendants;

(2) that all of the plaintiff's claims against defendants Greg Jackson, Gary McGee, Joseph Stephenson, James Kent, and Ted Loggins be dismissed;

(3) the motions for summary judgment of the remaining defendants, Mark Pelzer, Gene McClaran, and Jim Gates, be granted on the basis of qualified immunity and that this cause be dismissed with prejudice;

(4) Costs are taxed to the plaintiff.

DONE, this the 24th day of March, 2000.

/s/ H. Dean Buttram, Jr.
H. DEAN BUTTRAM, JR.
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

LARRY HOPE, Plaintiff,	)	
v.	)	
MARK PELZER; GENE MCCLARAN; GREG JACKSON; GARY MCGEE; JOSEPH STEPHENSON; JIM GATES also known as KEITH GATES; JAMES KENT; and TED LOGGINS, Defendants.	)	CV-96-BU-2968-S

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

(Filed March 10, 2000)

Plaintiff Larry Hope ("the plaintiff") was incarcerated at the William E. Donaldson Correctional Facility at the time he filed this *pro se* action pursuant to 42 U.S.C. § 1983, alleging that he had been deprived of rights, privileges, or immunities afforded him under the Constitution of the United States of America. In accordance with the usual practices of this court and 28 U.S.C. § 636(b), the complaint was referred to a magistrate judge for a preliminary report and recommendation. *See McCarthy v. Bronson*, 500 U.S. 136, 111 S. Ct. 1737, 114 L. Ed. 2d 194 (1991). It was subsequently reassigned to the undersigned magistrate judge.

I. BACKGROUND AND PROCEDURAL HISTORY

The plaintiff alleges in his original complaint that he was subjected to cruel and unusual punishment in violation of the Eighth Amendment while previously incarcerated at Limestone Correctional Facility and names as defendants, Mark Pelzer, Gene McClaran, Greg Jackson, Gary McGee, Joseph Stephenson, Jim Gates, James Kent, and Ted Loggins. He attached an affidavit, prison records, and copies of photographs to the complaint. As compensation for the alleged constitutional violations, the plaintiff seeks compensatory and punitive damages.[1]

On December 31, 1996, the court entered an Order for Special Report, directing that copies of the complaint in this action be forwarded to each of the named defendants and requesting that they file a special report addressing the factual allegations of the plaintiff's complaint. (Doc.

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[1] Although the plaintiff purports to seek injunctive and declaratory relief in addition to damages (see doc. 1, p. 3), it is clear that his claims relate to completed acts in the past for which damages would be the only avenue of relief. Further, as the plaintiff has been released from the Alabama correctional system, he is no longer housed at the Limestone Correctional Facility where these claims are alleged to have occurred; therefore, he no longer has standing to seek injunctive relief. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 103 S. Ct. 1660, 75 L. Ed. 2d 675 (1983); *Tucker v. Phyfer*, 819 F.2d 1030 (11th Cir. 1987). Although the plaintiff's claims for injunctive relief have been rendered moot due to his release, the "[t]ransfer [or release] of a prisoner does not moot a claim for money damages." *Cotterall v. Paul*, 755 F.2d 777, 780 (11th Cir. 1985), (citing *McKinnon v. Talladega County*, 745 F.2d 1360, 1362 (11th Cir. 1984)).

4).[2] The order listed the defendants identified by the plaintiff and his claims. It specified that the plaintiff was presenting Eighth Amendment claims concerning his being handcuffed to a "hitching post" on May 11, 1995, and June 7, 1995. (*Id.*, p. 3). The defendants were advised that the special report could be submitted under oath or accompanied by affidavits and, if appropriate, would be considered as a motion for summary judgment filed pursuant to Rule 56 of the *Federal Rules of Civil Procedure*. By the same order, the plaintiff was advised that after he received a copy of the special report submitted by the defendants, he should file counter-affidavits if he wished to rebut the matters presented by defendants in the special report. The plaintiff was further advised that such affidavits should be filed within twenty days after receiving a copy of the defendants' special report.

On February 10, 1997, the plaintiff filed a "Supplemental (sic) to Clerk of the Court," wherein he contended that the defendants placement of him on the "hitching post" violated his rights to procedural and substantive due process under the Fourteenth Amendment. (Doc. 41). It is a two page, unsigned document. There is no certificate of service attached showing that it was ever served on the defendants or their counsel.

On March 24, 1997, defendants Mark Pelzer, Gene McClaran, Gregory Jackson, Gary McGee, Joseph Stephenson, and Jim Gates filed a special report. (Doc. 11). It includes institutional incident reports, emergency

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[2] References herein to "Doc. ___" are to the particular pleading number assigned by the Clerk of the Court and located in the lower right-hand corner of the document.

and medical treatment reports, activity logs, and the affidavits of Pelzer, McClaran, Jackson, McGee, Stephenson, and Gates. On April 24, 1997, defendant James Kent filed a special report, including his affidavit. (Doc. 17). On September 27, 1997, defendant Ted Loggins filed a supplemental special report, including his affidavit. (Doc. 26). The plaintiff was notified that he would have twenty days to respond to the supplemental special report of Loggins, which the court intended to construe as a motion for summary judgment. (Doc. 28). The plaintiff was afforded the opportunity to file affidavits or other material if he chose. He was advised of the consequences of any default or failure to comply with *Fed. R. Civ. P.* 56. *See Griffith v. Wainwright*, 772 F.2d 822, 825 (11th Cir. 1985).

Counsel for the plaintiff entered a notice of appearance on October 17, 1997, and filed a "Preliminary Response" to the defendants' special report. (Doc. 29 & 30). On November 3, 1997, counsel for the plaintiff filed a "Special Report and Brief in Response to Defendants' Motion for Summary Judgment." (Doc. 33). In this document, the plaintiff informed the court that he was waiving and withdrawing his claims for excessive force in connection with the June 7, 1995 fight, which led to his being put on the hitching post for the second time. (Doc. 33, p. 1). The plaintiff also informed the court that he wanted to dismiss defendants Loggins, Jackson, McGee, Stephenson, and Kent from the lawsuit. (*Id.*). The plaintiff states that the only claims he wants to pursue are those against defendants McClaran, Pelzer, and Gates in connection with the May 11, 1997, hitching post incident, and defendant Gates in connection with the June 7, 1997,

hitching post incident. (*Id.*, p. 2). He also filed a second affidavit in support of his claim. (Doc. 32). On December 29, 1997, he filed a "Supplemental Brief in Opposition to Summary Judgment." (Doc. 42).

On February 13, 1999, the court conducted a telephonic status conference in this matter. Premised on that conference, the court informed the parties that it would be treating the defendants' special reports as motions for summary judgment. Accordingly, the parties were afforded an opportunity to file any additional briefs or evidentiary material in support of their positions. (Doc. 36). The defendants filed a response to the court's order. (Doc. 37). The plaintiff filed a "Third Supplemental Brief in Opposition to Defendants' Motion for Summary Judgment." (Doc. 38).

On December 29, the plaintiff filed a motion seeking to stay this action until the United States District Court for the Middle District of Alabama decides a pending motion for class certification in the case of *Hicks v. Allen*, Case No. 96-D-854-N. (M.D. Ala. 4/16/99). (Doc. 39). According to the plaintiff's counsel, the present "case is one of approximately ten (10) in which Plaintiff's counsel represents inmates who have damage claims as a result of having been unconstitutionally pilloried on a device known as the 'hitching post.' " (Doc. 40, pp. 1-2). Counsel for the plaintiff herein have also informed the court that the present matter is also related to the case of *Austin v. James*, Case No. 95-T-637-N (M.D. Ala. 5/15/95), involving claims by 200-300 inmates who have been subjected to the "hitching post" during their incarceration and who are seeking injunctive relief and not damages. (Doc. 40, p. 2; Doc. 33, Attachment 2, pp. 1-2). The motion to stay will

be denied by a separate order entered contemporaneously with this report and recommendation.

II. SUMMARY JUDGMENT STANDARD

Because the special reports of the defendants are being considered as motions for summary judgment, the Court must determine whether the moving party, the defendants, are entitled to judgment as a matter of law. Summary judgment may be granted only if there are no genuine issues of material fact. *Fed. R. Civ. P. 56.* In making that assessment, the Court must view the evidence in a light most favorable to the non-moving party and must draw all reasonable inferences against the moving party. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). The burden of proof is upon the moving party to establish his prima facie entitlement to summary judgment by showing the absence of genuine issues and that he is due to prevail as a matter of law. *See Clark v. Coats & Clark, Inc.*, 929 F.2d 604 (11th Cir. 1991). Once that initial burden has been carried, however, the non-moving party may not merely rest upon his pleadings, but must come forward with evidence supporting each essential element of his claim or to refute a claim of qualified immunity. *See Celotex Corp.*, 477 U.S. 317; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986); *Barfield v. Brierton*, 883 F.2d 923 (11th Cir. 1989). Unless the plaintiff, who carries the ultimate burden of proving his action and the absence of qualified immunity, is able to show some evidence with respect to each element of his claim, all other issues of fact become immaterial, and the moving party is entitled to judgment

as a matter of law. *See Celotex Corp.*, 477 U.S. 317; *Bennett v. Parker*, 898 F.2d 1530 (11th Cir. 1990).

III. FACTS

A. May 11, 1995 Incident

Applying the above standard, the following facts are undisputed or, if disputed, are taken in a light most favorable to the plaintiff. The plaintiff was incarcerated at the Limestone Correction Facility in 1995 and assigned to the chain gang. On May 11, 1995, while on the chain gang, the plaintiff and another inmate got into a verbal altercation. Officer McClaran concluded that the altercation was the plaintiff's fault and ordered him put on the hitching post for being "disruptive to the work squad." (Doc. 32, ¶ 5). According to the plaintiff, he was placed on the hitching post at 12:30 p.m. by Sergeant Pelzer, (*Id.*, ¶ 7). He notes, however, that the incident report shows that Officers Gates and Dempsey[3] placed him on the restraining bar. (*Id.*; *See also* Doc. 11, Exhibit 7, Incident Report. p. 2). No disciplinary write-up or hearing preceded his being placed on the bar.

Captain David J. Wise later concluded that the other inmate was responsible for the altercation and ordered the plaintiff released at 2:40 p.m. According to the Department of Corrections "Activity Log" for the two hours the plaintiff was restrained on the bar, he was offered water and a restroom break every fifteen minutes. (Doc. 11, Activity Log). Of the nine times he was offered

[3] Officer Dempsey is not named as a defendant herein.

water or a restroom break, the plaintiff refused every offer of water and all but one offer of a restroom break. (*Id.*).

A physical examination of the plaintiff was conducted by an institution nurse at approximately 6:50 p.m. The examination revealed no signs of bruises, contusions, abrasions, lacerations, trauma, or illness. (Doc. 11, Hope Emergency/Treatment Record).

B. June 7, 1995 Incident

On June 7, 1995, the plaintiff was involved in another altercation when, according to him, "a correctional officer who had cursed [him] and grabbed [him] by the neck because [he] was sleeping on the bus on the way to a work site." (Doc. 32, ¶ 11). Because he began choking, he attempted to get the officer to release his grip. At that time, other officers arrived and "subdued, handcuffed, placed [him] in leg irons, transported him back to Limestone,[4] and put [him] on the hitching post" by

[4] According to the defendants, at approximately 10:30 a.m., Officer James Kent instructed the inmates on the bus to exit. After the order was repeated several times and five inmates, including the plaintiff failed to respond, Officer Loggins entered the bus and instructed the plaintiff to get off. The plaintiff responded to Loggins by saying "fuck you." (Doc. 17, Ex. A, Kent Affidavit, pp. 1-2; Doc. 26, Loggins Affidavit, p. 2). He also started towards the officer in an aggressive manner. He reached out to grab Loggins by the throat. (*Id.*). Officer Jackson stepped onto the bus and saw the plaintiff trying to grab Loggins around the neck. (Doc. 11, Ex. 3, Jackson Affidavit, pp. 1-2). Jackson was trying to help Loggins with the plaintiff when they all tripped and fell off the bus. Officers Loggins, Kent,

Loggins, Kent, Jackson, Stephenson and Mcgee.[5] (*Id.*, ¶ 13).

According to the plaintiff's affidavit that is attached to the original complaint, when he was returned to the institution, he was taken to the health care unit where he did not receive any treatment for his injuries. (Doc. 1, Plaintiff's Affidavit, p. 1). He was examined by Nurse Wilda Nichols at about 11:35 a.m. (*Id.*, Medical Record). Nichols observed that the plaintiff's speech was normal, he had a few scattered bumps on his left shoulder, a reddened area to the right shoulder, no bleeding, no knots on his head, he denied visual disturbances, and he ambulated well. Nichols noted that no treatment was needed at that time. (*Id.*). The plaintiff was then placed on the hitching post without a shirt, in the sun, for approximately seven hours.

The plaintiff is only slightly taller than the hitching post itself so his arms grew tired from being handcuffed so high. He was given water only once or twice during

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Mesler, and the plaintiff fell on top of Jackson. (*Id.*, pp. 1-2). Officer Joseph Stephenson observed the officers and plaintiff fall off the bus from about thirty five yards away and ordered the remainder of the inmate squad to sit on the ground. Officers Jackson, Loggins, and Kent handcuffed the plaintiff. (Doc. 11, Ex. 5, Stephenson Affidavit, pp. 1-2). Officer Pelzer was conducting security checks on the other inmate squads and arrived at the scene after the altercation. He helped place leg irons on the plaintiff and escorted him to the security vehicle. (Doc. 11, Pelzer Affidavit, pp. 1-2). The plaintiff was taken to the health care unit at the institution at about 10:50 a.m.

[5] In his affidavit, defendant McClaran states that he placed the plaintiff on the restraining bar. (Doc. 11, Ex. 2, p. 1).

the seven hours he was restrained, and he was teased by two unidentified officers when he requested water. (Doc. 32, ¶¶ 18, 19). The guards brought a cooler of ice and water to the hitching post area, gave some to the security dogs first, then moved the cooler closer to the plaintiff, removed the lid, and kicked it over. (Doc. 1, the plaintiff's affidavit, p. 2). He also states that "at one point during the hottest part of the day [he] was left without water for at least three hours." (Doc. 32, ¶ 18).

The plaintiff did not receive a disciplinary charge, behavior citation, or any hearing at any time as a result of the altercation at the bus. (Doc. 32, ¶ 21).

IV. DISCUSSION

As already discussed, the plaintiff, at most, appears to be asserting claims (1) that certain defendant officers used excessive force on him and (2) that certain officers violated his right to procedural and substantive due process and subjected him to cruel and unusual punishment by placing him on the restraining bar on May 11, 1995, and June 7, 1995. His November 3, 1997, response seeks to withdraw his claim that the officers used excessive force concerning the June 7 incident at the bus. He further requests that the court dismiss defendants Loggins, Jackson, McGee, Stephenson, and Kent from the lawsuit entirely. Premised on the plaintiff's response, his excessive force claim in connection with the June 7 incident is due to be dismissed with prejudice. Further, defendants Loggins, Jackson, McGee, Stephenson, and Kent are also due to be dismissed with prejudice on all claims. The

only defendants remaining in the lawsuit are Mark Pelzer, Gene McClaran, and Keith Gates. The plaintiff's only remaining claims are that the use of the restraining bar constituted a violation of due process and that he was subjected to cruel and unusual punishment.

A. Qualified Immunity

The defendants have raised the defense of qualified immunity. Government officials exercising a discretionary function are entitled to qualified immunity from damages unless their acts or decisions contravene clearly established constitutional or statutory rights of which a reasonable official should have knowledge. *See Mitchell v. Forsyth*, 472 U.S. 511, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985); *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S. Ct. 2751, 73 L. Ed. 2d 396 (1982). "That qualified immunity protects government actors is the usual rule; only in exceptional cases will government actors have no shield against claims made against them in their individual capacities." *Lassiter v. Alabama A & M University Board of Trustees*, 28 F.3d 1146, 1149 (11th Cir. 1994) (en banc) (footnote omitted). In *Lassiter*, the court stated:

> Unless a government agent's act is so obviously wrong, in the light of pre-existing law, that only a plainly incompetent officer or one who was knowingly violating the law would have done such a thing, the government actor has immunity from suit. *See Malley v. Briggs*, 475 U.S. 335, 341-43, 106 S. Ct. 1092, 1096-97, 89 L. Ed. 2d 271 (1986). Because qualified immunity shields government actors in all but exceptional cases, courts should think long and hard before stripped defendants of immunity.

Lassiter, 28 F.3d at 1149. *See also Anderson v. Creighton*, 483 U.S. 636, 641, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987) (The "contours of the rights must be sufficiently clear that a reasonable official would understand that what he is doing violates that right."). The court in *Lassiter* also stated:

> For the law to be clearly established to the point that qualified immunity does not apply, the law must have earlier been developed in such a concrete and factually defined context to make it obvious to all reasonable government actors, in the defendant's place, that "what he is doing" violates federal law. *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S. Ct. 3034, 3039, 97 L. Ed. 2d 523 (1987). Qualified immunity is a doctrine that focuses on the actual, on the specific, on the details of concrete cases.
>
> The most common error we encounter, as a reviewing court, occurs on this point: courts must not permit plaintiffs to discharge their burden[6] by referring to general rules and to the violation of abstract "rights." *See Anderson*, 483 U.S. at 639-41, 107 S. Ct. at 3038-39 (even though the "general right [defendant] was alleged to have violated – the right to be free from warrantless searches of one's home unless the searching officers have probable cause and there

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[6] "Once the qualified immunity defense is raised, plaintiffs bear the burden of showing that the federal 'rights' allegedly violated were 'clearly established,' *Barts*, 865 F.2d at 1190 (citing *Mitchell v. Forsyth*, 472 U.S. 511, 528, 105 S. Ct. 2806, 2816, 86 L. Ed. 2d 411 (1985))."

are exigent circumstances – was clearly established," [the] lower court should have "consider[ed] the argument that it was not clearly established that the circumstances with which [defendant] was confronted did not constitute probable cause and exigent circumstances") (emphasis added); *see also Barts*, 865 F.2d at 1190 (stating "clearly established" question at specific, factually defined, level).

"General propositions have little to do with the concept of qualified immunity," *Muhammad v. Wainwright*, 839 F.2d 1422, 1424 (11th Cir. 1987). "If caselaw, in factual terms, has not staked out a bright line, qualified immunity almost always protects the defendant." *Post v. City of Fort Lauderdale*, 7 F.3d 1552, 1557 (11th Cir. 1993), *modified*, 14 F.3d 583 (11th Cir. 1994); *accord Kelly v. Curtis*, 21 F.3d 1544, 1554 (11th Cir. 1994).[7] "The line is not to be found in abstractions – to act reasonably, to act with probable cause, and so forth – but in studying how these abstractions have been applied in concrete circumstances." *Barts*, 865 F.2d at 1194. And, as the *en banc* court recently accepted:

> When considering whether the law applicable to certain facts is clearly established, the facts of cases relied upon as precedent are important. The facts need not be the same as the facts of the immediate case. But they do not need to be materially similar. *See e.g., Edwards v. Gilbert*, 867 F.2d 1271, 1277 (11th Cir. 1989). *Public officials are not obligated to be creative or imaginative in drawing analogies from previously decided cases.*

Adams v. St. Lucie County Sheriff's Dept., 962 F.2d, 1563, 1573, 1575 (11th Cir. 1992), (Edmondson, J., dissenting) (emphasis added), approved *en banc*, 998 F.2d 923 (11th Cir. 1993). For qualified immunity to be surrendered, pre-existing law must dictate, that is, truly compel (not just suggest or allow or raise a question about), the conclusion for every like-situated, reasonable government agent that what defendant is doing violates federal law in the circumstances.

Because qualified immunity is a doctrine of practical application to real-life situations, courts judge the acts of defendant government officials against the law and facts at the time defendants acted, not by hindsight, based on later events. *See Hunter*, 502 U.S. at ___, 112 S. Ct. at 537 ("the court should ask whether the agents acted reasonably under settled law in the circumstances, not whether another reasonable, or more reasonable, interpretation of the events can be construed five years after the fact").

The subjective intent of government actor defendants plays no part in qualified immunity analysis. *Anderson*, 483 U.S. at 641, 107 S. Ct. at 3040 (despite that courts may inquire into "information possessed" by defendant, the defendant's "subjective beliefs . . . are irrelevant"); *Mitchell v. Forsyth*, 472 U.S. 511, 517, 105 S. Ct. 2806, 2810 86 L. Ed. 2d 411 (1985) (in *Harlow*, "this Court purged qualified immunity

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[7] "We leave open the possibility that occasionally the words of a federal statute or federal constitutional provision will be specific enough to establish the law applicable to particular circumstances clearly and to overcome qualified immunity even in the absence of case law."

> doctrine of its subjective components"); *Hansen v. Soldenwagner*, 19 F.3d 573, 578 (11th Cir. 1994) ("[t]he Supreme Court in *Harlow* staked a new path for immunity law by abandoning the subjective element of 'good faith' immunity in favor of an objective test"). Objective legal reasonableness is the touchstone.

28 F.3d 1149-50 (footnotes retained) (emphasis in original). *Accord Gonzalez v. Lee County Housing Authority*, 161 F.3d 1290, 1295 (11th Cir. 1998); *Dolihite v. Maughon*, 74 F.3d 1027, 1040-41 (11th Cir.), *cert. denied*, 519 U.S. 870 (1996), *McCoy v. Webster*, 47 F.3d 404, 407 (11th Cir. 1995).

Addressing the actions of misbehaving inmates is clearly within the discretionary function of prison guards. *See Jordan v. Doe*, 38 F.3d 1559, 1566 (11th Cir. 1994) ("discretionary authority" includes "all actions of a governmental official that (1) 'were undertaken pursuant to the performance of his duties,' and (2) were 'within the scope of his authority' ") (quoting *Rich v. Dollar*, 841 F.2d 1558, 1564 (11th Cir. 1988)). The plaintiff does not contest this. Accordingly, the burden is on him to demonstrate that the defendants violated clearly established constitutional law by restraining the plaintiff on the "restraining bar."

"In this circuit, the law can be 'clearly established' for qualified immunity purposes only by decisions of the U.S. Supreme Court, Eleventh Circuit Court of Appeals, or the highest court of the state where the case arose." *Jenkins v. Talladega City Bd. of Educ.*, 115 F.3d 821, 826-27 n. 4 (11th Cir.), *cert. denied*, 522 U.S. 966 (1997) (quoted in *Flores v. Satz*, 137 F.3d 1275, 1278 (11th Cir. 1998)).

B. Cruel and Unusual Punishment

The Eighth Amendment prohibition against cruel and unusual punishment is triggered when a prisoner is subjected to an "unnecessary and wanton infliction of pain." *Whitley v. Albers*, 475 U.S. 312, 319, 106 S. Ct. 1078, 89 L. Ed. 2d 251 (1986). "In order to state a § 1983 cause of action against prison officials based on a constitutional deprivation resulting from cruel and unusual punishment, there must be at least some allegation of a conscious or callous indifference to a prisoner's rights. . . . " *Williams v. Bennett*, 689 F.2d 1370, 1380 (11th Cir. 1982), *cert. denied*, 464 U.S. 932 (1983). The plaintiff complains that the very act of placing him on a restraining bar for a period of hours as a form of punishment was cruel and unusual in violation of the Eighth Amendment. Furthermore, the plaintiff claims that he was left in the sun without a shirt and in an awkward position which left him with swollen, bruised wrists. The plaintiff also asserts that he was taunted by an unnamed guard when he requested water.

In response to the defendants' request for qualified immunity, the plaintiff replies: (1) "The hitching post is a variation of the pillory, and the Supreme Court recognized the unconstitutionality of the Pillory over a century ago;" (2) The defendants' conduct was unconstitutional under pre-1995 Eleventh Circuit law; and, (3) The defendants cannot claim qualified immunity because the rights violated are so readily apparent that clarifying law is not necessary.

The plaintiff relies on the Fifth Circuit case of *Gates v. Collier*, 501 F.2d 1291 (5th Cir. 1985),[8] and the Eleventh Circuit cases of *Ort v. White*, 813 F.2d 318, 327 (11th Cir. 1987) and *Williams v. Burton*, 943 F.2d 1572, 1576 (11th Cir. 1991), *cert. denied*, 505 U.S. 1208 (1992). *Gates* dealt with a variety of complaints about prison practices and conditions, corporal punishment among them. The *Gates* court stated that "depriving inmates of mattresses, hygienic materials, and adequate food, handcuffing inmates to the fence and cell for long periods of time, shooting at and around inmates to keep them standing or moving, and forcing inmates to stand, sit, or lie on crates, stumps, or otherwise maintain awkward positions for prolonged periods . . . run afoul of the Eighth Amendment.[9] *Id.*, at

[8] Decisions of the former Fifth Circuit Court of Appeals handed down prior to October 1, 1981, are binding precedent. *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981) (en banc).

[9] In *Gates*, the record was replete with evidence of physical abuse and brutality. The court stated:

> [Mississippi law] makes it illegal for any prison official other than the superintendent to order corporal punishment; and where corporal punishment is expressly authorized by the superintendent, it is limited to the whip or lash, which is not to be used for more than seven licks. While the evidence indicated that the lash had not been used at Parchman since 1965, the record was replete with innumerable instances of physical brutality and abuse in disciplining inmates who are sent to M[aximum] S[ecurity] U[nit]. These include administering milk of magnesia as a form of punishment, stripping inmates of their clothes, turning the fan on inmates while naked and wet, depriving inmates of mattresses, hygienic materials, and adequate food, handcuffing inmates to the fence and to cells for long periods of time, shooting at and around inmates to keep them standing or moving, and forcing inmates to stand, sit or lie on crates, stumps, or otherwise maintain awkward positions for prolonged periods. Indeed, the district court found the superintendent and other prison officials acquiesced in these practices. Unquestionably, the district court correctly enjoined prison authorities from punishing inmates by these methods of corporal punishment. We have no difficulty in reaching the conclusion that these forms of corporal punishment run afoul of the Eighth Amendment, offend contemporary concepts of decency, human dignity, and precepts of civilization which we profess to possess.

Gates, 501 F.2d at 1306.

1306. The court in *Gates* did not address the restraining bar issues as to create a "bright line" rule that restraining an inmate who is disruptive to the work squad to a restraining bar would violate the inmate's constitutional rights. *Lassiter*, 28 F.3d at 49-50.

In *Ort*, the plaintiff appealed the district court's dismissal of his civil rights action wherein he claimed that prison officials violated his Eighth Amendment protection against cruel and unusual punishment and his Fourteenth Amendment due process rights. His claims were premised on allegations that he was denied water when he refused to work on details away from the institution and that he was confined to the prison sallyport for several hours at a time. The court upheld the dismissal of the Eighth and Fourteenth Amendment claims for the denial of water, finding that the actions were not punitive but rather an immediately necessary coercive, good faith

measure used to compel compliance with prison rules and regulations. The court did note that it "might have reached a different decision if later, once back at the prison, officials had decided to deny appellant water as punishment for his refusal to work." *Ort*, 813 F.2d at 326. Regarding his confinement in the sallyport to keep him from watching television after he attempted to circumvent the disciplinary order revoking his television privileges, which was part of his punishment for failing to follow orders in the field, the court held that the allegations did not support a § 1983 claim. *Ort*, 813 F.2d at 327-28.

In *Williams*, the plaintiff was placed in "four-point" restraints and "gaged [sic]" with gauze and tape for approximately twenty-eight and one-half hours after he created a "general disturbance" by threatening to kill correctional officers and spitting on one of the officers. When he was taken to his cell, the plaintiff continued to yell, threaten others with bodily harm, and spit on officials. The plaintiff challenged the district court's dismissal of his case on summary judgment. The court rejected his contention that the Eighth Amendments [sic] was violated by the use of the restraints and the gag. The court reasoned that the actions of the prison staff in using the restraints were intended to limit the plaintiff's ability to inflict physical harm against himself and others and the use of the gauze and tape were to prevent him from encouraging further unrest and to protect the officers from his assaultive behavior. *Williams*, 943 F.2d at 1575. Finally, the court found that the use of the restraints and gag were not " 'unnecessary and wanton infliction of pain' forbidden by the Eighth Amendment." *Id.*

Reviewing the foregoing authorities, as well as others, the court does not find that as of May and June 1995, the law was clearly established to the point of defeating the defendants' claim of qualified immunity on the Eighth Amendment claim. There was no case "stak[ing] out a bright line" that the handcuffing, shackling, or chaining of a prisoner to a fixed object, such as a restraining bar, for a period of up to seven hours violated the prohibition against cruel and unusual punishment. *Lassiter*, 28 F.3d at 1146 (quoting *Post v. City of Fort Lauderdale*, 7 F.3d 1552, 1557 (11th Cir. 1993, *modified*, 14 F.3d 583 (11th Cir. 1994)). The "burden of proving the law to be clearly established [cannot be met] by stating constitutional rights in general terms." *Flores*, 137 F.3d at 1277 (quoting *Foy v. Holston*, 94 F.3d 1528, 1532 (11th Cir. 1996)). The law must be such that the conduct of the defendants "violates the law in the circumstances." *Lassiter*, 28 F.3d at 1150. The plaintiff has failed to show any cases from the Unites [sic] States Supreme Court, the Eleventh Circuit Court of Appeals, or the Alabama Supreme Court addressing the specific question before this court.

While the plaintiff complains that he was hot and thirsty, it is undisputed that he was offered water at least once or twice on both occasions. Concerning the first incident, the record shows that he turned down offers of fluids eight times and to use the bathroom seven times. (Doc. 11, Hope Activity Log). He accepted the opportunity to use the restroom one time and does not state that it was thereafter denied. (*Id.*). Concerning the second incident, he states in his second affidavit that he was given water "once or twice during the entire seven hours, but that was not enough, and during the hottest part of

the day [he] was left without water for at least three hours." (Doc. 32, ¶ 18). As to the plaintiff's claim that he was taunted by a guard when he asked for water, that guard is not one of the defendants named in his lawsuit.[10]

Based on the foregoing considerations, the magistrate judge recommends that the motions for summary judgment filed by the defendants be granted on the plaintiff's Eighth Amendment claim. This court cannot conclude

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[10] The only reference to the identity of the guard is found in the Report and Recommendation of Magistrate Judge Vanzetta Penn McPhershon [sic] in *Austin v. James*, Case No. 95-637. She states:

> Officers gave Hope water perhaps as many as two times during the day. He remembered the incident because of the officers' behavior on one of the occasions that he asked for water. Nearby were two officers who were assigned to the "dog truck," the vehicle used to search for escapees. Hope asked them for water, but they teased him about being on the hitching post. He then asked another officer, one Odium, for water. In response, Odium went to the guard house and filled a cooler with ice and water, ostensibly to return it to Hope. Then one of the officers from the dog truck told him not to give Hope water. Odium obeyed and set the cooler on the ground near Hope; the dog truck officer removed pans from his truck, filled them with water from the cooler and "watered the dogs." . . . When he finished watering the dogs, the officer approached Hope with the cooler as if to give him water. Before he did so, however, he set the cooler on the ground perhaps three feet from Hope, "took the top off" and "kicked it over" so that the water ran onto the ground. . . . At that point, Hope had not been given water for two hours. Another hour passed before he was given any more. . . .

(Doc. 33, Ex. 2, pp. 43-44).

that the named defendants' actions in placing the plaintiff on the restraining bar were so contrary to then existing law so as to defeat their assertion of qualified immunity.

C. Due Process

The defendants' [sic] first assert that the plaintiff has not alleged a due process violation. (Doc. 37, p. 3). The complaint nowhere alleges a Fourteenth Amendment Due Process claim. The only place where it is asserted is in the "Supplement" that he filed on February 10, 1997. However, that document is not signed. The certificate of service only certifies that it is "true and correct." It does not evidence service on the defendants or their counsel. Assuming for the sake of argument in that the claim is properly before the court, summary judgment is due to be granted on the qualified immunity issue.

In opposition to the defendants' assertions of qualified immunity, the plaintiff cites the Eleventh Circuit's holdings in *Ort* and *Williams*, and *Dailey v. Byrnes*, 605 F.2d 858 (5th Cir. 1979), *opinion withdrawn* January 7, 1980. In *Ort*, while the court was discussing the plaintiff's Fourteenth Amendment Due Process claim, concerning the decision to deny the plaintiff water when he refused to work, the court stated:

> Once again we emphasize the distinction between punishment in the strict sense and immediately necessary coercive measures undertaken either to obtain compliance with a valid prison rule or in response to a spontaneous disturbance. Clearly, appellant would have a legitimate due process claim if, after the misconduct or disturbance had abated, prison

> officials had summarily denied him water or imposed any other form of punishment without first affording him some type of disciplinary hearing. A fourteenth amendment violation occurs in this context where prison officers continue to employ force or other coercive measures after the necessity for such coercive action has ceased.

Ort, 813 F.2d at 327. In *Williams*, while discussing the restraints used by the defendants, the court stated:

> Plaintiff's third claim under the Eighth Amendment is a bit more difficult. Once restraints are initially justified, it becomes somewhat problematic as to how long they are necessary to meet the particular exigent circumstances which precipitated their use. The basic legal principle is that once the necessity for the application of force ceases, any continued use of harmful force can be a violation of the Eighth and Fourteenth Amendments, and any abuse directed at the prisoner after he terminates his resistance to authority is an Eighth Amendment violation. *Ort v. White*, 813 F.2d 318, 324 (11th Cir. 1987) (citing *Smith v. Dooley*, 591 F. Supp. 1157, 1168 (W.D. La. 1984), *aff'd*, 778 F.2d 788 (5th Cir. 1985)).

Williams, 943 F.2d at 1575-76. In *Dailey*, the plaintiff alleged that his confinement at the Escambia County Jail violated the Eighth Amendment in that he was subjected to "intolerable living conditions, inadequate diet, lack of proper medical services, [a] failure to provide exercise and an opportunity for fresh air, assaults by officers against him and the refusal of the sheriff to honor appearance bonds for his release." *Dailey*, 605 F.2d at 859. At the

conclusion of a non-jury trial, "the district court found neither the conditions at the jail nor the conduct of the officials to be unconstitutional." *Id.* In affirming the district court on all matters "except those arising out of one particular assault on the plaintiff," the court stated:

> The one area in which we cannot fully accept the district court's conclusions concerns the plaintiff's effort to obtain damages for injuries the plaintiff suffered when Frank Reid, one of the jailers, struck him in the head causing a partial loss of hearing. At trial officer Reid admitted that he had struck Dailey. The district court found that several days earlier, plaintiff had thrown water on Reid, and the blow, several days later, was in retaliation to the previous water throwing incident. Noting that plaintiff had sought no relief for the assault but the court had power to grant any relief mandated by the evidence in this pro se case, the district court concluded that it was not persuaded that a constitutional right had been violated on the proof presented by plaintiff, citing *Aulds v. Foster*, 484 F.2d 945 (5th Cir. 1973) and *Tolbert v. Bragan*, 451 F.2d 1020 (5th Cir. 1971), *See also Roberts v. Williams*, 456 F.2d 819 (5th Cir.), *cert. denied*, 404 U.S. 866, 92 S. Ct. 83, 30 L. Ed. 2d 110 (1971).
>
> We have frequently held that 'an unjustified beating at the hands of prison officials gives rise to a section 1983 action.' *Bruce v. Wade*, 537 F.2d 850, 853 (5th Cir. 1976); *see, e.g., Aulds v. Foster*, 484 F.2d 945, 946 (5th Cir. 1973). In *Hamilton v. Chaffin*, 506 F.2d 904, 909 (5th Cir. 1975) quoting *Johnson v. Glick*, 481 F.2d 1028, 1033 (2nd Cir.), *cert. denied*, 414 U.S. 1033, 94 S. Ct. 462, 38 L. Ed. 2d 324 (1973), we observed,

> [i]n determining whether the constitutional line has been crossed, the court must look to such factors as the need for the application of force, the relationship between the need and the amount of force that was used, the extent of injury inflicted, and whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of casing [sic] harm. *Id.* 481 F.2d at 1033. *See Tolbert v. Bragan*, 451 F.2d 1020 (5th Cir. 1971).

The district court did not find that Reid was making a 'good faith effort to maintain or restore discipline'; nor did he find that Reid 'need[ed]' to strike the plaintiff in order to subdue him or for any other legitimate reasons. NO such reasons are obvious from this record. The district judge apparently believed that because Reid struck the plaintiff 'in retaliation' for the incident that had occurred several days before, the plaintiff's constitutional rights were not violated. But 'retaliation' for an incident that occurred several days earlier is more likely to be not an effort to restore order but instead either a motive for 'maliciously' striking the plaintiff 'for the very purpose of causing harm' or else summary, informal, unofficial and unsanctioned corporal punishment – an obvious due process violation.

Dailey, 605 F.2d at 860-61.

None of the cases cited by the plaintiff allow the conclusion that in May and June 1995, it was "clearly established" that the placement of an inmate on the

restraining bar in circumstances such as those before this court were sufficient to defeat the defendants' claim of qualified immunity on the plaintiff's due process claim. The plaintiff simply has not, and cannot under the applicable caselaw at the relevant time, defeated the claim of qualified immunity.

D. The Wrongfulness of the Defendants' Conduct was "Readily Apparent"

The plaintiff also asserts that the defendants are not entitled to qualified immunity because their violation of the plaintiff's rights was so readily apparent that clarifying law is not necessary. The plaintiff premises this argument on the fact that the Supreme Court recognized the unconstitutionality of the pillory[11] almost one hundred years ago. *See Weems v. United States*, 217 U.S. 349, 376-79, 30 S. Ct. 544, 553, 54 L. Ed. 793 (1909). The plaintiff asserts that "the main difference between the pillory of times past and the hitching post of today is that modern technology has substituted metal shackles for the 'holes' that used to be constructed of movable boards." (Doc. 42, p. 5).

In support of the claim that the defendants are not entitled to qualified immunity, the plaintiff cites *Smith v. Mattox*, 127 F.3d 1416 (11th Cir. 1997), involving the district court's denial of a defendant's claim of qualified

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[11] "Pillory" is defined as "[a] wooden framework with holes through which an offender's head and hand are placed. A person put in a pillory usu[ally] had to stand rather than sit (as with the stocks). *Black's Law Dictionary* 1168 (7th ed. 1999).

immunity in an excessive force case under § 1983. In affirming the district court's denial of immunity, the Eleventh Circuit, after reciting the black-letter law concerning immunity, stated that "Fourth Amendment jurisprudence has staked no bright line for identifying force as excessive." *Smith*, 127 F.3d at 1419. The court went on:

> Smith cites no Fourth Amendment case, and this court has located none, in which a police officer subjected a previously threatening and fleeing arrestee to nondeadly force after the arrestee suddenly became docile. Smith therefore must show that Mattox's conduct was so far beyond the hazy border between excessive and acceptable force that Mattox had to know he was violating the Constitution even without caselaw on point. Smith does so, but barely. The hazy border between permissible and forbidden force is marked by a multifactored, case-by-case balancing test. The test requires weighing of all the circumstances, such as "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." In this inquiry, the officer's intent, whether evil or good, is irrelevant.
>
> The grunt and the blow that Smith asserts that he heard and felt while Mattox was on Smith's back, coupled with the severity of Smith's injury, push this case over the line. . . . We thus conclude that this case falls within *the slender category of cases in which the unlawfulness of the conduct is readily apparent even without clarifying caselaw.*

Mattox, 127 F.3d at 1419 (footnotes omitted) (emphasis added).

That the law on the use of the restraining bar was not "clearly established" as of the time of the defendants' conduct is amply demonstrated by the differing magistrate judge opinions cited by the parties dealing with the issue. The court further finds that the defendants' alleged conduct in this case does not fall "within the slender category of cases in which the unlawfulness of the conduct is readily apparent even without clarifying caselaw." *Mattox*, 127 F.3d at 1419.

V. RECOMMENDATION AND NOTICE OF RIGHT TO OBJECT

Accordingly, for the reasons stated above, the magistrate judge **RECOMMENDS** that the defendants' special reports be treated as motions for summary judgment and, as such, that the motions be **GRANTED** and this action is **DISMISSED WITH PREJUDICE**.

Any party may file specific written objections to this report and recommendation within ten (10) days from the date it is served in accordance with 28 U.S.C. § 636(b)(1).

The Clerk is **DIRECTED** to serve a copy of this report and recommendation upon the counsel for the plaintiff and upon counsel for the defendants.

DONE, this the 10th day of March, 2000.

/s/ John E. Ott
JOHN E. OTT
UNITED STATES
MAGISTRATE JUDGE